Supreme Court, U.S.
FILED
OCT 22 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 70-301

GERRY CHARLOTTE PHELPS,
Petitioner

v.

STATE OF TEXAS
Respondent

ON APPLICATION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE RESPONDENT

CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
First Assistant
ALFRED WALKER
Executor Assistant
ROBERT C. FLOWERS
Assistant Attorney General
HOWARD M. FENDER
Assistant Attorney General
Attorneys for Respondent
P. O. Box 12548, Capitol Station
Austin, Texas 78711

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 70-301

GERRY CHARLOTTE PHELPS,
Petitioner

v.

STATE OF TEXAS
Respondent

ON APPLICATION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF
CRIMINAL APPEALS

BRIEF FOR THE RESPONDENT

The Respondent State of Texas opposes the granting of certiorari in the instant cause for the reasons set forth below.

QUESTION PRESENTED

The wording used by Petitioner in "Question Presented" in Petitioner's application is misleading, primarily because of the use of the words "indirect and artful" and the words "as well as irrelevant". Therefore, without agreeing that there is really any constitutional question involved in the instant cause, Respondent feels that the inquiry should be restricted to the following question:

"Where a state court rules that testimony concerning the physical description of co-conspirators is admissible, and where such testimony reveals that Petitioner, a white woman and one 'Alex,' a black co-conspirator, were living on the same premises, is such evidence so prejudicial as to deprive Petitioner of a fair trial by an impartial jury in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?"

Respondent has no particular quarrel with the Statement of the Case set forth by Petitioner except to call to the attention of the Court the fact that there are seven other places in the Statement of Facts at which witnesses were requested to describe and otherwise identify various persons involved in the conspiracy which led to the robbing of the liquor store. At this time it is not considered pertinent to set forth all of such testimony, but this general representation is only necessary so that the Court may understand that the identification of "Alex" is not an isolated instance in the record but rather is in keeping with the remainder of the presentation of the State's case.

Petitioner's application contains (Appendix "A") the Opinion of the Court of Criminal Appeals. Respondent urges that such decision is binding on this Court under the principle expressed in *Erie v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (U.S. Sup.Ct., 1938), unless it be made to appear that such decision is clearly unconstitutional.

An examination of the entire record of the instant cause reveals that the only attempt to inject racism into the trial was the unwarranted effort of defense counsel to make an objection to the Court in the pres-

ence and hearing of the jury for the obvious purpose of creating an error which would detract from an otherwise valid conviction. At no time during the interrogation of witnesses nor at any time during the arguments to the jury did the prosecutor refer or allude to Petitioner's apparent cohabitation with "Alex." Other than defense counsel's objections, there is not even an inference of improper relationship.

If the prosecutor had failed to properly identify the various members of the conspiracy which led to the robbery, which is the ultimate subject of the instant conviction, defense counsel would have vigorously pointed out the various loose ends left by the prosecutor in an effort to place the blame on someone other than his client. The trial court ruled that the evidence was admissible. The Appellate Court approved the rulings of the trial court. Petitioner should not now be allowed to urge upon this court that action affirmatively taken on his behalf be construed in afterthought as an effort on the part of the prosecutor to create a prejudicial situation.

WHEREFORE, PREMISES CONSIDERED, Respondent urges the Court to deny the Petition for Certiorari.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executor Assistant

ROBERT C. FLOWERS
Assistant Attorney General

HOWARD M. FENDER
Assistant Attorney General

Attorneys for Respondent
P. O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief for the Respondent was served on the attorney for the Petitioner by depositing same in the United States Mail, postage prepaid, certified mail, on this the ____ day of October, 1971, addressed as follows: Mr. Ben G. Levy, Attorney at Law, 2244 W. Holcombe Boulevard, Houston, Texas 77025.

HOWARD M. FENDER
Assistant Attorney General